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by Amanda Pirt Meyer and Lauren Zwirlein

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by Hon. Cynthia M. Davis

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1

Introduction: Mental Disorders and the Law

Terri A. deRoon-Cassini
Hon. Mary E. Triggiano

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II. Vulnerable Populations in the Legal System [§ 1.2] 2

III. The Role of Trauma in Mental Health and the Law [§ 1.3] 3

I. Mental Health and the General Population [§ 1.1]

In the United States (U.S.), mental health disorders are pervasive and affect every sector of society. Twenty percent of people in the U.S. are living with a mental health diagnosis, which can significantly range in severity. The severity of mental health disorders is defined by the level at which the mental health disorder interferes with the ability to function on a daily basis.

In a national study conducted in 2017, 46.6 million people in the U.S. were living with a mental health disorder currently or within the last year. Rates of mental health disorders vary based on gender, age, race, and ethnicity. For those living with any mental health disorder, women, individuals over the age of 50 years, and white Americans have the highest prevalence rates. When considering those who have the most severe mental health disorders, which are those having the greatest impairment in day-to-day functioning, females, people between the ages of 18 and 25 years, and individuals who identify with two or more races carry the largest burden of mental health disorder in society. Yet even more alarming is that 50% of adolescents in the U.S. have a lifetime prevalence of any mental health disorder. Kathleen R. Merikangas et al., *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results from the National Comorbidity Survey Replication-Adolescent Supplement (NCS-A)*, J. Am. Acad. Child Adolescent Psychiatry 49(10): 980–89 (Oct. 2010), https://pubmed.ncbi.nlm.nih.gov/20855043/.

Mental disorders also constitute the greatest cause of disability in the U.S. and Canada. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, Archives of Gen. Psychiatry 62(6): 593–602 (June 2005), https://pubmed.ncbi.nlm.nih.gov/15939837/; Substance Abuse & Mental Health Servs. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health*, HHS Pub. No. SMA 18-5068, NSUDH Series H-53 (Rockville, MD: Ctr. for Behavioral Health Statistics & Quality, 2018), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf.

The most common mental health disorders include those classified as mood disorders, which are characterized by serious and persistent difficulty maintaining an even mood state. Depression, a common mood disorder, affects approximately 15 million adults in the U.S., or about 7% of the population, every year. Rates of anxiety-type disorders range anywhere from 1% to just over 7% of the population, and over 8% of the general population meets criteria for posttraumatic stress disorder (PTSD) following a traumatic event. Severe and persistent mental illness, such as schizophrenia and bipolar disorder, affect approximately 2.2 million and 1.8 million Americans, respectively. *See* William E. Narrow et al., *Revised Prevalence Estimates of Mental Disorders in the United States*, Archives of Gen. Psychiatry 59(2): 115–23 (2002); Ronald C. Kessler et al., *Twelve-Month and Lifetime Prevalence and Lifetime Morbid Risk of Anxiety and Mood Disorders in the United States*, Int'l J. Methods Psychiatric Rsch. 21(3): 16–84 (Sept. 2012).

And an even starker finding is that as of 2018, 5.8% of Americans had alcohol use disorder, a disorder that has significant health, financial, and societal implications. Nat'l Inst. on Alcohol Abuse & Alcoholism, *Alcohol Use Disorder*, https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-use-disorder (last visited Mar. 16, 2021). Finally, when considering neurocognitive disorders that affect older adults, approximately 6.9% of Americans have dementia, and it is expected that by 2025, 7 million people over the age of 65 will be diagnosed with Alzheimer's disease. The reality is that mental health disorders are pervasive and varied in American society and having an understanding of mental health issues is paramount.

II. Vulnerable Populations in the Legal System [§ 1.2]

While mental health disorders are prevalent in the general U.S. population, they are even more prevalent in people who are part of the criminal justice population. According to Bureau of Justice Statistics, more than one-half of individuals involved in the criminal justice system suffer from a mental health disorder. U.S. Dep't of Just., *Bureau of Justice Statistics Special Report: Mental Problems of Prison and Jail Inmates* (Sept. 2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf. Although mental illness is not a strong predictor of criminal behavior, two million arrests each year in the U.S. involve persons with serious mental illness. These individuals often end up in the justice system instead of receiving the care they need to support their diagnosis and recovery. Dr. Altha Stewart, associate professor, Dep't of Psychiatry, and director, Ctr. for Health in Justice-Involved Youth, Univ. of Tenn. Health Sci. Ctr., Presider, Keynote Address at the National Stepping Up Summit, Washington, D.C. (Apr. 18, 2016).

In addition, of those individuals with serious mental health disorders, approximately 75% also have a co-occurring substance use disorder. Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jail in America* 12 (New York, NY: Vera Inst. of Just., 2015). As a result, these individuals are more likely to not make bail, to receive longer sentences, to not become eligible for early release from incarceration, to cycle through the system, and to be victimized. *Id.* at 11–13.

Mental health disorders in the juvenile justice system also are widespread. Approximately 50–75% of the 2 million youth subject to proceedings in the juvenile justice system meet criteria for a mental health disorder, which can lead to long-term involvement in the criminal justice system if left untreated. Johanna Wald & Daniel Losen, *Defining and Redirecting a School-to-Prison Pipeline*, New Dir. Youth Dev. 9–15 (2003), https://doi.org/10.1002/yd.51. Of those youth incarcerated, approximately 40–80% have at least one diagnosable mental health disorder. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, Archives of Gen. Psychiatry 59(12): 1133–43 (2002), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/206941.

These are the adults and youth who pass through courtrooms in the U.S. every day. With the rates and varied presentations of mental illness in the U.S., it is imperative that the legal system develop a deeper understanding of mental health and, in turn, work more effectively and compassionately to address the needs of justice-involved persons.

III. The Role of Trauma in Mental Health and the Law [§ 1.3]

It is worth noting that there has been much focus in recent years on the effects of trauma on justice-involved individuals and the importance of trauma-informed approaches. Like mental health disorders, trauma is widespread and particularly pervasive in the justice system. *Trauma* is defined as "actual or threatened death, serious injury, or sexual violence" that is experienced or witnessed by an individual or that happened to a loved one. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* 271–72 (5th ed. 2013).

This can include single events, such as gun violence, or sustained events, such as ongoing abuse or neglect.

Traumatic life experiences are common among justice-involved individuals with serious mental health disorders, substance use disorders, or both. Studies of people in the juvenile and criminal justice system reveal high rates of mental and substance use disorders and personal histories of trauma. Julian D. Ford & Charles Wilson, SAMHSA's Trauma and Trauma-Informed Care Experts Meeting (2012); Julian D. Ford, *Treatment of Complex Trauma: A Sequenced, Relationship-Based Approach* (New York, NY, Guilford Press, 2013). Children and families in the child welfare system similarly experience high rates of trauma and associated behavioral health problems. Katie A. McLaughlin et al., *Childhood Adversity and Adult Psychiatric Disorder in the US National Comorbidity Survey*, Psych. Med. 40(4): 847–59 (2009).

Trauma histories of justice-involved individuals, especially those already suffering from mental illness, can contribute to the events leading to their appearance in the courtroom and shape their behavior once there. Understanding and practicing trauma-informed care when interacting with justice-involved individuals can lead to better outcomes. *See SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (July 2014) (Rockville, MD: Substance Abuse & Mental Health Servs. Admin.), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf.

Judges and attorneys, whether they are practicing in treatment courts or in traditional court settings, should engage people with histories of trauma by recognizing the presence of trauma symptoms and acknowledging the role that trauma has played in their lives. *See id.*

This is not to say that mental health diagnoses should excuse behavior, but understanding how mental health and mental illnesses can affect an individual can lead to a better understanding of how to move forward. It is important to consider that mental illnesses often manifest as dysregulation of emotions, behaviors, and thoughts. This triad of dysregulation leads to habits that can be difficult to break, and often these thoughts, behaviors, and emotions lead to further impairment in one's life. For example, someone who is suffering from the consequences of trauma can be depressed and will likely have an associated behavior, such as withdrawal or isolation, that downstream may lead to impairment in everyday functioning, such as absenteeism at work or withdrawal from important relationships. Behaving depressed then can lead to an individual feeling more depressed, and the illness continues. Similarly, when someone is feeling depressed, thoughts tend to be more depressive in nature, such as having a hopeless outlook, which can limit cognitive flexibility. From the outside, someone behaving and thinking this way might be viewed as having a lack of motivation, not being positive or engaged in life, and possibly not willing to take responsibility for themselves. This view can perpetuate the stigma associated with mental illness and continue a perspective that individuals with mental health diagnoses are to blame for their condition.

Trauma-informed care is often used as a supportive framework within treatment courts but can and should be applied throughout the justice system. Addressing trauma, as well as social determinants of health, such as housing and food security, is part of an integrated, whole-person approach to individuals participating in mental health courts.

Like trauma, stigma plays a significant role in a person's ability to seek help and live a meaningful and productive life. Stigma is a degrading and debasing attitude of society that discredits a person's dignity, marginalizes affected individuals, violates basic human rights, markedly diminishes the chances of a stigmatized person of achieving full potential, and seriously hampers the pursuit of happiness and contentment. Fraser W. Steel et al., *Combatting the Stigma of Mental Disorders—A Position Paper from the EFPSA Social Impact Initiative* 3 (Aug. 2015).

Additionally, stigma creates barriers to employment, safe housing, family engagement, connection to one's community, higher education, and so on. Understanding the effects of stigma is not merely an issue of societal compassion; it is a fundamental issue of equity and justice. Mental health disorders are chronic brain disorders affecting millions of individuals. Yet there are gaps in care and treatment services in every community, warranting collaboration now more than ever.

Readers of this book will learn about the laws affecting individuals with mental health disorders and the legal duties and responsibilities of lawyers and mental health professionals. But just as important, readers also will learn about how discrimination affects persons with mental illnesses or cognitive disabilities and thereby results in dire consequences. Finally, readers will learn about problem-solving courts, especially those addressing individuals with mental health disorders, including their use of trauma-informed care and procedural justice to better understand human behavior and provide better outcomes for people with mental health disorders.

More specifically, chapters 2 and 3 address the definitions, procedures, and issues surrounding mental health and sex offender commitments in Wisconsin under Wis. Stat. chs. 51 and 980. Chapter 4 covers guardianships of the person and estate, focusing primarily on adult guardianships, while chapter 5 addresses the special issues that arise when representing minors with mental health concerns. In chapter 6, the author explores the intersection of mental health issues and criminal law. Chapter 7 is devoted to discussing the legal duties and responsibilities of mental health professionals. Discrimination against persons with mental illnesses and other cognitive disabilities is the focus of chapter 8, and chapter 9 addresses benefits available for those individuals. The final chapter of the book is devoted to discussing treatment courts.

2

Involuntary Civil Commitments

Colleen D. Ball
Kaitlin Lamb

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I. Scope of Chapter [§ 2.1]

Chapter 51 of the Wisconsin Statutes is the State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act. It regulates the government's ability to confine and treat an individual having a dangerous mental health condition against his or her will. The statute is long, dense, and complex. This chapter offers an overview of the provisions governing the involuntary civil commitment process for adults diagnosed with a mental illness, mental disorders, or developmental disabilities. It explains the commonly litigated provisions, notes case law essential to understanding those provisions, and highlights the substantive and procedural constitutional rights of individuals undergoing commitment. This chapter does not cover the voluntary admissions of adults, the commitment of minors (see chapter 5, *infra*), criminal commitments (see chapters 4 and 6, *infra*), or specialized commitments for individuals who are alcoholic or drug dependent (see chapters 8 and 10, *infra*).[1]

II. Introduction [§ 2.2]

Before the 1970s, the legal criteria for an involuntary commitment were not stringent. The government could confine an individual simply for being mentally ill. Then federal cases such as *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975), dramatically changed the landscape of mental commitment law across the country. Recognizing that an involuntary commitment constitutes a massive curtailment of liberty, *Lessard* and *O'Connor* hold that the government may not confine a mentally ill individual unless he or she is currently dangerous to self or others.

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[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 25; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-11 (Apr. 23, 2021).

Lessard declared chapter 51 unconstitutional and established minimum substantive and procedural rights for individuals undergoing involuntary commitment. In response, the Wisconsin Legislature repealed, recreated, and redesigned chapter 51 to advance two expressly stated policies. One is to provide a unified system of providing care and treatment to individuals suffering from mental illness, mental disorders, or developmental disabilities in the least restrictive alternative appropriate to their needs. Wis. Stat. § 51.001(1). The other is to protect the personal liberties of the person whom the government seeks to confine and treat. Wis. Stat. § 51.001(2).

The legislature recreated chapter 51 in the 1970s and has amended it many times since then. The Wisconsin Supreme Court provided a helpful history of these amendments in *Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985), *Outagamie County v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, 359 Wis. 2d 272, 856 N.W.2d 603, and *Outagamie County v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607.

Many of chapter 51's provisions have not been tested against the U.S. Supreme Court precedent establishing fundamental constitutional rights for individuals undergoing commitment. Case law interpreting the statute is in flux. The Wisconsin Supreme Court will soon decide several cases that could significantly alter the rights of individuals undergoing commitment. All lawyers involved in a commitment proceeding—judges, corporation counsel, and defense counsel—must apply the statute carefully, informed by state and federal precedent, to ensure a fair commitment proceeding and an accurate result.

III. Initial Involuntary Commitments [§ 2.3]

A. In General [§ 2.4]

Wis. Stat. § 51.20 provides for different types of involuntary commitments. When a county seeks to confine and treat an individual who is not under a commitment order, it files a petition for an initial (or original) involuntary commitment. While different government entities may initiate an involuntary commitment proceeding, it is usually brought by a county, represented by corporation counsel. Thus, this chapter uses the term "county" generically to denote the party prosecuting the commitment proceeding.

B. Requirements for an Initial Involuntary Commitment [§ 2.5]

1. In General [§ 2.6]

Wisconsin's legal standard for an involuntary commitment is set forth in Wis. Stat. § 51.20(1). The individual must be (1) mentally ill, drug dependent, or developmentally disabled; (2) a proper subject for treatment; and (3) dangerous. Each of these terms has a specific definition under the law.

2. Mental Illness, Drug Dependence, or Developmental Disability [§ 2.7]

Mental illness is a "mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community." Wis. Stat. § 51.01(13)(a). For purposes of an involuntary commitment, *mental illness* means "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism." Wis. Stat. § 51.01(13)(b).

Drug dependence refers to "a disease that is characterized by a person's use of one or more drugs that is beyond the person's ability to control to the extent that the person's physical health is substantially impaired or his or her social or economic functioning is substantially disrupted." Wis. Stat. § 51.01(8). Chapter 51 does not define the term drug, but the court of appeals has held that it includes gasoline when a person uses it for huffing. *Marathon Cnty. v. Zachary W.*, No. 2014AP955, 2014 WL 6755242, ¶¶ 13, 17 (Wis. Ct. App. Dec. 2, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Developmental disability refers to a disability "attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, intellectual disability, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability." Wis. Stat. § 51.01(5)(a). The disability must continue or be expected to continue indefinitely, and it must be a substantial handicap to the individual. *Id.* Cerebral palsy, epilepsy, and dementia primarily caused by degenerative brain disorders do not qualify as "developmental disabilities" under this statute. Wis. Stat. § 51.01(5)(a), (b).

3. Proper Subject for Treatment [§ 2.8]

The "proper subject for treatment" element is often difficult to understand and apply. *Treatment* means "those psychological, educational, social, chemical, medical or somatic techniques designed to bring about *rehabilitation* of a mentally ill, alcoholic, drug dependent, or developmentally disabled person." Wis. Stat. § 51.01(17) (emphasis added). Thus, to be a proper subject for treatment, the individual must be "capable of rehabilitation." *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, ¶ 30, 340 Wis. 2d 500, 814 N.W.2d 179.

If treatment will "'maximize[e] the[] individual functioning and maintenance' of the subject, but not 'help[] in controlling or improving their disorder[],' then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment." *Id.* ¶ 36 (citation omitted). Chapter 55, which governs long-term protective placement and services, applies to individuals who fall into this category.

Conversely, if treatment will "'go beyond controlling … activity' and will 'go to controlling or improving their disorder[],' then the subject individual has rehabilitative potential and is a proper subject for treatment." *Helen E.F.*, 2012 WI 50, ¶ 36, 340 Wis. 2d 500. The focus on the individual's potential for rehabilitation furthers chapter 51's purpose, which is for the short-term commitment and treatment of people who can be reintegrated into society. *Id.* ¶¶ 21, 25.

Unfortunately, there is no clear line between mental conditions and treatments that fall under chapter 51 and those that fall under chapter 55 (Protective Service System). A court must evaluate each individual and case separately. *Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, ¶ 46, 375 Wis. 2d 542, 895 N.W.2d 783.

In one case, the court of appeals held that an individual with chronic paranoid schizophrenia was not a proper subject for treatment under chapter 51 because rehabilitation was not possible. *Milwaukee Cnty. Combined Cmty. Servs. Bd. v. Athans (In re Athans)*, 107 Wis. 2d 331, 333, 320 N.W.2d 30 (Ct. App. 1982). In other cases, appellate courts have declared individuals with chronic paranoid schizophrenia to be proper subjects for treatment. *See, e.g.*, *J.W.J.*, 2017 WI 57, ¶ 48, 375 Wis. 2d 542; *C.J. v. State (In re Mental Condition of C.J.)*, 120 Wis. 2d 355, 357, 362, 354 N.W.2d 219 (Ct. App. 1984).

In another case, the supreme court held that an individual with Alzheimer's disease was not a "proper subject for treatment" under chapter 51 because the condition is "incurable and untreatable" and "the only available medical remedy is maintenance—not treatment—of the disease." *Helen E.F.*, 2012 WI 50, ¶ 37, 340 Wis. 2d 500.

The court of appeals recently held that an individual who had autism, was nonverbal, had intellectual and developmental disabilities, had been diagnosed with obsessive-compulsive disorder and pica, and was the subject of a chapter 54 guardianship and a chapter 55 protective placement, was still a "proper subject for treatment" under chapter 51. Although the individual's intellectual and developmental disabilities could not be cured, the symptoms of pica and obsessive-compulsive disorder were controlled with medication. *Marathon Cnty. v. P.X. (In re Condition of P.X.)*, No. 2017AP1497, 2018 WL 3155825, ¶¶ 17–21 (Wis. Ct. App. Jun. 26, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

4. Dangerous [§ 2.9]

a. In General [§ 2.10]

A county must not confine people who are mentally ill simply because they behave differently or to ensure them a higher standard of living. To justify such a significant deprivation of liberty, the individual must also be "dangerous" to himself or others. *O'Connor v. Donaldson*, 422 U.S. 563, 575–76 (1975); *Addington v. Texas*, 441 U.S. 418, 426 (1979). Dangerousness is the most litigated issue in hearings under Wis. Stat. § 51.20.

For an initial commitment, the county must establish dangerousness under one of the five standards in Wis. Stat. § 51.20(1)(a)2.a.–e. Each standard requires proof of recent acts or omissions to indicate a "substantial probability" of a different type of harm. *Substantial probability* means "much more likely than not." *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 35, 390 Wis. 2d 50, 937 N.W.2d 901 (citation omitted).

b. Threats or Acts of Suicide or Self-Harm [§ 2.11]

Under the first standard, an individual is dangerous if he or she shows "a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." Wis. Stat. § 51.20(1)(a)2.a.

The term *threat* means "an indication of impending danger or harm." *Outagamie Cnty. v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, ¶ 34, 359 Wis. 2d 272, 856 N.W.2d 603. The term *suicidal* means suicidal ideation whether or not accompanied with expressed intent to harm. Thus, the articulation of a specific plan is not necessary to constitute a threat under this provision. *Id.* ¶¶ 36–37.

c. Threats or Acts of Homicide or Harm to Others [§ 2.12]

Under the second standard, an individual is dangerous if there is a substantial probability that he or she will cause physical harm to other persons. This must be demonstrated with evidence that the individual has recently engaged in homicidal or violent behavior or with evidence that the individual has recently placed others in reasonable fear of violent behavior or serious physical harm. Wis. Stat. § 51.20(1)(a)2.b.; *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 38, 390 Wis. 2d 50, 937 N.W.2d 901.

For example, a court-appointed psychiatrist's testimony that the individual threatened to strangle a police officer or kill people who made fun of him was sufficient evidence of dangerousness under this standard. *D.K.*, 2020 WI 8, ¶ 48, 390 Wis. 2d 50. The person in danger need not have subjective awareness of the threat. *R.J. v. Winnebago Cnty. (In re R.J.)*, 146 Wis. 2d 516, 523, 431 N.W.2d 708 (Ct. App. 1988).

In contrast, evidence that an individual was upset, angry, yelling and pointing a finger at another person did not satisfy this standard. *Milwaukee Cnty. v. Cheri V. (In re Mental Commitment of Cheri V.)*, No. 2012AP1737, 2012 WL 6571724, ¶ 17 (Wis. Ct. App. Dec. 18, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

d. Pattern of Acts Indicating Impaired Judgment [§ 2.13]

Under the third standard, an individual is dangerous if he or she shows such impaired judgment, as demonstrated by a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or to other persons. Wis. Stat. § 51.20(1)(a)2.c.

A diagnosis of schizophrenia and the general risks associated with schizophrenia do not satisfy this standard. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 53, 57, 391 Wis. 2d 231, 942 N.W.2d 277. "If it did, the statutory elements of mental illness and dangerousness would be merely redundant." *Id.* ¶ 57.

Evidence that a mentally ill individual who has never made threats or engaged in physical acts nevertheless makes other people feel uncomfortable, fearful, threatened, or motivated to defend themselves does not satisfy this standard. *Chippewa Cnty. v. M.M. (In re Mental Commitment of M.M.)*, No. 2017AP2018, 2018 WL 2046954, ¶ 20 (Wis. Ct. App. May 1, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

On the other hand, an individual's pattern of delusional paranoia, telling family members that people were out to get him, refusing medication and treatment, and saying that something was wrong with his head satisfied this standard. *Outagamie Cnty. v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, ¶ 40, 359 Wis. 2d 272, 856 N.W.2d 603.

e. Inability to Satisfy Basic Needs [§ 2.14]

Under the fourth standard, an individual is dangerous if the individual has engaged in recent behavior demonstrating that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter, or safety and, without prompt and adequate treatment, serious physical injury, debilitation, or disease is imminent. Wis. Stat. § 51.20(1)(a)2.d.

Evidence that despite freezing weather a homeless shelter would not accept a mentally ill individual, who wore tattered clothes and lacked the capacity to recognize reality and meet the ordinary demands of life, established that the individual was dangerous under this standard. *Vilas Cnty. Dep't of Human Servs. v. N.J.P. (In re Mental Commitment of N.J.P.)*, No. 2019AP1567, 2020 WL 7350100, ¶¶ 3, 19 (Wis. Ct. App. Dec. 15, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

In contrast, a county's evidence that an individual was unable to care for himself, unable to maintain a job, received disability benefits, and risked homelessness without the support of family did not establish dangerousness under this standard. *Langlade Cnty v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 48, 53, 55, 56, 391 Wis. 2d 231, 942 N.W.2d 277.

f. Inability to Prevent Deterioration Leading to an Inability to Function [§ 2.15]

Whereas the first four standards require evidence that the individual has recently engaged in dangerous acts or omissions, the fifth standard authorizes an initial commitment *to prevent* the individual from deteriorating to the point that he or she cannot function independently in the community or will lack control over his or her thoughts or actions. Under the fifth standard, an individual is dangerous if he or she

- Is mentally ill;
- Is incompetent to make medication or treatment decisions;
- Demonstrates a substantial probability that he or she needs care or treatment to prevent further deterioration as evidenced by his or her treatment history and recent behavior; and
- Demonstrates a substantial probability that, without treatment, he or she will lack services necessary for care or safety and suffer severe mental, emotional, or physical harm that will result in an inability to function independently in the community or the loss of control over thoughts or actions.

Wis. Stat. § 51.20(1)(a)2.e.

The supreme court addressed the constitutionality of the fifth standard in *State v. Dennis H. (In re Commitment of Dennis H.)*, 2002 WI 104, 255 Wis. 2d 359, 647 N.W.2d 851. It held that the standard does not violate the 14th Amendment on substantive due process, vagueness, overbreadth, or equal protection grounds.

An individual's failure to take medication consistently is evidence that he or she will not take advantage of services in the community as the fifth standard requires. *Dane Cnty. v. Kelly M. (In re Mental Commitment of Kelly M.)*, 2011 WI App 69, ¶ 17, 333 Wis. 2d 719, 798 N.W.2d 697.

➤ ***Caution.*** The Wisconsin Supreme Court recently clarified that an individual has a constitutional right to refuse medication even if he or she is incompetent to make medication or treatment decisions. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 31–32, 391 Wis. 2d 35, 940 N.W.2d 875. Thus, *Kelly M.* might no longer accurately reflect the law.

The fifth standard does not apply to an individual who has a developmental disability, is dependent on drugs, is under a Wis. Stat. § 55.06 order for protective placement, or is eligible for such an order. *Kelly M.*, 2011 WI App 69, ¶ 32, 333 Wis. 2d 719. However, the fifth standard does apply to an individual who has been diagnosed with both a mental illness and either a developmental disability or drug dependency. *Id.* ¶ 14.

C. Commencement of an Initial Commitment Proceeding [§ 2.16]

1. In General [§ 2.17]

Chapter 51 provides three ways to commence an initial commitment proceeding: (1) a law enforcement officer can file an emergency detention, (2) a hospital treatment director can file a "hold" of a voluntary patient, or (3) three people can file a three-party petition.

In any case, the county represents the public and drafts the necessary pleadings. Wis. Stat. § 51.20(4). Due process requires the county to "set forth the basis for detention with particularity." *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).

2. Emergency Detention [§ 2.18]

A law enforcement officer or other person may take an individual into custody if the officer or other person has cause to believe the individual is (1) mentally ill, drug dependent, or developmentally disabled; (2) dangerous to himself or others as defined in Wis. Stat. § 51.15(1)(ar)1.–4.; and (3) reasonably believed to be unable or unwilling to cooperate with voluntary treatment. *See* Wis. Stat. § 51.15(1)(ag).

The officer's belief must be based on either

- A specific recent overt act or attempt or threat to act or omission by the individual which is observed by the officer, Wis. Stat. § 51.15(1)(b)1.; or
- A specific recent overt act or attempt or threat to act or omission by the individual that is reliably reported to the officer by any other person, including the individual's probation, extended supervision, or parole agent, Wis. Stat. § 51.15(1)(b)2.

In counties with a population of less than 750,000 (all Wisconsin counties other than Milwaukee County), the law enforcement officer files the statement of emergency detention with the circuit court having probate jurisdiction in the county of detention. This filing commences the action and has the same effect as the filing of a Wis. Stat. § 51.20 petition. The procedural requirements for this type of emergency detention are set forth in Wis. Stat. § 51.15(5).

In counties with a population of 750,000 or more (Milwaukee County), the law enforcement officer must deliver the statement of emergency detention to the detention facility, where the individual must be evaluated within 24 hours. Wis. Stat. § 51.15(4)(a), (b). If the treatment director or designee determines that the individual is eligible for commitment, the treatment director or designee must file the following documents with the circuit court having probate jurisdiction in the county of detention:

- The officer's statement of emergency detention;
- A supplement to the statement indicating whether the individual is mentally ill, developmentally disabled, or drug dependent along with any additional information; and
- A notification of the detention.

The filing of the statement and notification has the same effect as the filing of a Wis. Stat. § 51.20 petition. The procedural requirements for this type of emergency detention are set forth in Wis. Stat. § 51.15(4)(b) and (c).

➤ ***Practice Tip.*** In all counties, if the officer who signed the statement of emergency detention does not have personal knowledge of the conduct justifying the detention, the circuit court should dismiss the proceeding. *Milwaukee Cnty. v. Parham (In re Parham)*, 95 Wis. 2d 21, 26, 289 N.W.2d 326 (Ct. App. 1979).

3. Treatment Director Hold on a Voluntary Patient [§ 2.19]

An individual may voluntarily admit himself or herself to a treatment facility. If the director or designee of the treatment facility determines that such an individual is eligible for an emergency detention under Wis. Stat. § 51.15(1), the director or designee may sign a statement of emergency detention and detain the individual for evaluation, diagnosis, and treatment. In this situation, the treatment director undertakes the responsibilities required of a law enforcement officer and must promptly file the statement of emergency detention with the circuit court having probate jurisdiction in the county of detention. Wis. Stat. § 51.15(10).

4. Three-Party Petition [§ 2.20]

Three people may initiate an involuntary commitment proceeding by asking corporation counsel to draft a petition to have the individual examined to determine whether he or she should be involuntarily committed. Wis. Stat. § 51.20(1)(b), (4). Except in limited circumstances, corporation counsel must represent the public in all chapter 51 proceedings and must draft all necessary papers for the action. Wis. Stat. § 51.20(4). Corporation counsel need not represent the public when he or she does not believe that involuntary commitment is appropriate. Wis. Stat. § 51.20(4)(b).

➤ ***Note.*** If someone other than corporation counsel drafts a petition for commitment or recommitment, the circuit court must refuse it—even without a showing of prejudice. *D.S. v. Racine Cnty. (In re D.S.)*, 142 Wis. 2d 129, 416 N.W.2d 292 (1987) (commitment); *State v. S.P.B. (In re S.P.B.)*, 159 Wis. 2d 393, 464 N.W.2d 102 (Ct. App. 1990) (recommitment).

The petition for examination must allege that the individual is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous under one of the five standards of dangerousness in Wis. Stat. § 51.20(1)(a)2a.–e. The petition must also contain "a clear and concise statement of facts which constitute probable cause to believe the petition." Wis. Stat. § 51.20(1)(c).

The petition must be signed by three people, and one of the signers must have personal knowledge of the events described in it, unless it is filed pursuant to a court order under Wis. Stat. § 938.30(5)(c)1. or (d)1., which concern the competency of individuals in juvenile proceedings. Wis. Stat. § 51.20(1)(b). The petition "shall be sworn to be true." Wis. Stat. § 51.20(1)(c).

The petition must state the names and mailing addresses of the petitioners and their relation to the individual. The petition must also state the names and mailing addresses of the individual's spouse, adult children, parents or guardian, custodian, siblings, person in the place of a parent, and person with whom the individual lives or resides. If this information is unknown or inapplicable, the petition must so state. Wis. Stat. § 51.20(1)(c).

5. Venue [§ 2.21]

A petition for examination "may be filed in the court assigned to exercise probate jurisdiction for the county where the subject individual is present or the county of the individual's legal residence." Wis. Stat. § 51.20(1)(c).

There are no cases interpreting this provision, and it does not indicate the point in time when the individual's presence or residence is measured. However, the supreme court interpreted an analogous statute using the same language to mean that venue is determined by the individual's presence or legal residence when the petition was filed. *State v. Corey J.G. (In Interest of Corey J.G.)*, 215 Wis. 2d 395, 410, 419, 572 N.W.2d 845 (1998) (applying Wis. Stat. § 48.185(1) (1993–94)).

6. Detention for a Commitment Proceeding [§ 2.22]

After the filing of a petition for examination, either the circuit court or a court commissioner must review it within 24 hours (excluding Saturdays, Sundays, and legal holidays) to determine whether there is "cause to believe" that the individual meets the requirements for an initial commitment. Wis. Stat. § 51.20(2)(a). The court must order the individual's detention only "based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual." *Id.*

If the court issues a detention order, then a law enforcement officer must take the individual into custody and present him or her with the following:

- A copy of the court's detention order;
- A copy of the petition;
- A notice of hearing; and
- A written statement of the individual's right to (1) an attorney, (2) a jury trial if requested more than 48 hours before the final hearing, (3) the legal standard on which the individual can be committed, and (4) a probable cause hearing within 72 hours after being taken into custody under Wis. Stat. § 51.15 (excluding Saturdays, Sundays, and legal holidays). (*See* Wis. Stat. § 801.15(1)(a) for the definition of "holiday.")

The law enforcement officer must also orally inform the individual of these rights. Wis. Stat. § 51.20(2)(b).

If the court does not issue a detention order, the law enforcement officer must serve the same documents on the individual and orally inform the individual of the same rights. Wis. Stat. § 51.20(2)(c).

The individual and the individual's attorney must receive notice of commitment proceedings. The notice may be given by telephone, if the person providing the notice places in the case file a signed statement indicating the time the notice was given and the person or persons spoken with. Wis. Stat. § 51.20(2)(b). Notice of the time and place of the probable cause hearing must be personally served on the individual and the individual's attorney within a reasonable time before the hearing. *Id.* The county must also notify the individual and the individual's attorney of the time and place of the final hearing within a reasonable time before the hearing. Wis. Stat. § 51.20(10)(a).

Even without a detention order, a law enforcement officer must take the individual into custody if the officer has cause to believe that the individual is mentally ill, drug dependent, or developmentally disabled and eligible for commitment under Wis. Stat. § 51.20(1)(a), "based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual." Wis. Stat. § 51.20(2)(c). If the individual is detained, the staff at the facility where the individual is detained must orally inform the individual of the statutory rights and serve the individual with a copy of all documents required by this section. *Id.*

D. Probable Cause Hearings [§ 2.23]

1. Hearing Requirements [§ 2.24]

Wis. Stat. § 51.20(5) prescribes requirements for probable cause hearings. These requirements are addressed in section 2.65, *infra.*

2. Hearing Deadlines and Circuit Court Competency [§ 2.25]

a. In General [§ 2.26]

If the circuit court violates a prescribed time period for holding a probable cause hearing, it loses competency to adjudicate the commitment proceeding and must dismiss the proceeding. *Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, ¶ 12, 252 Wis. 2d 490, 642 N.W.2d 592.

b. When the Individual is Detained [§ 2.27]

If a law enforcement officer or other authorized person detains the individual pursuant to a Wis. Stat. § 51.20(1) petition for examination, a Wis. Stat. § 51.15 emergency detention, or other Wis. Stat. § 51.20 procedure, the court must hold a hearing within 72 hours after the individual is taken into custody, excluding Saturdays, Sundays, and legal holidays, to determine whether there is probable cause to believe the allegations of Wis. Stat. § 51.20(1)(a). Wis. Stat. § 51.20(7)(a).

A county must not exclude the day of detention from the calculation. *Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, 252 Wis. 2d 490, 642 N.W.2d 592; *see also Dane Cnty. v. Stevenson L.J. (In re Mental Commitment of Stevenson L.J.)*, 2009 WI App 84, ¶ 11, 320 Wis. 2d 194, 768 N.W.2d 223. Nor may the county reset the clock by filing a substantially identical successive petition for examination. *Stevenson L.J.*, 2009 WI App 84, ¶ 13, 320 Wis. 2d 194.

The individual is deemed "in custody" when he or she is under the physical control of a law enforcement officer or other person authorized to make an emergency detention. Wis. Stat. § 51.15(3).

➤ ***Caution.*** In 2013, the legislature amended Wis. Stat. § 51.15(3), (4)(b), and (5) to provide that the 72-hour clock is triggered when a law enforcement officer takes the individual into physical custody. Under the prior version of the statute, the individual's arrival at the detention facility triggered the 72-hour clock. Be aware that older cases such as *Ryan E.M.*, 2002 WI App 71, ¶ 5, 252 Wis. 2d 490, and *Milwaukee County v. Delores M. (In re Delores M.)*, 217 Wis. 2d 69, 72, 577 N.W.2d 371 (Ct. App. 1998), are based on the prior statute and incorrectly state the trigger point.

c. When the Individual Is Not Detained or Is an Inmate [§ 2.28]

If the individual is not detained, or if the individual is an inmate of a state prison, jail, or house of correction, then the court must hold the probable cause hearing "within a reasonable time of the filing of the petition." Wis. Stat. § 51.20(7)(b).

d. When the Individual Requests Postponement [§ 2.29]

Either the individual or the individual's attorney may request a postponement of the probable cause hearing. In no event may the postponement exceed seven days from the date of detention. Wis. Stat. § 51.20(7)(a).

The parties may waive the 72-hour period for a probable cause hearing if they enter a settlement agreement under Wis. Stat. § 51.20(8)(bg).

3. Probable Cause Standard [§ 2.30]

The purpose of the probable cause hearing is to determine whether the government has sufficient evidence to justify detention of the individual for an involuntary commitment hearing. Thus, the circuit court looks for evidence of the allegations made in the petition filed under Wis. Stat. § 51.20(1)(a)—that the individual is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous under one of the five standards of dangerousness in Wis. Stat. § 51.20(1)(a)2a.–e.

There does not appear to be case law defining "probable cause" for a chapter 51 involuntary commitment. In criminal cases, "probable cause" means more than a mere possibility or suspicion that a defendant committed a crime but not proof beyond a reasonable doubt. The test is an objective examination of the totality of the circumstances. *State v. Weber*, 2016 WI 96, ¶ 20, 372 Wis. 2d 202, 887 N.W.2d 554. It is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Id.* (quoted source omitted).

4. Probable Cause Dispositions [§ 2.31]

a. Individual Fails to Appear [§ 2.32]

If the individual fails to appear for the probable cause hearing, the court may issue an order for the individual's detention and must hold a hearing within 48 hours, excluding Saturdays, Sundays, and holidays, from the time the individual was detained. Wis. Stat. § 51.20(7)(c).

b. Circuit Court Finds Probable Cause for Commitment [§ 2.33]

If the court determines that there is probable cause to believe the allegations made under Wis. Stat. § 51.20(1), it must appoint two examiners to examine the individual pursuant to Wis. Stat. § 51.20(9)(a). The circuit court must also schedule a final hearing within 14 days after the time the individual was detained. Wis. Stat. § 51.20(7)(c). There are several exceptions to this 14-day rule. They include the following:

- If the circuit court postponed the probable cause hearing pursuant to Wis. Stat. § 51.20(7)(a), the court must schedule the hearing within 21 days after detention. Wis. Stat. § 51.20(7)(c).
- If an individual requests a jury trial later than 5 days after detention, the final hearing must be held within 14 days after the date of demand. Wis. Stat. § 51.20(11)(a).
- After finding probable cause, the court may release the individual pending the final hearing and issue an order stating conditions for release. A final hearing must be held within 30 days after the order. Wis. Stat. § 51.20(8)(a).
- If the individual was not detained under Wis. Stat. § 51.15 or 51.20, or if the individual is an inmate of a state prison, county jail, or house of corrections, the court must schedule the hearing within 30 days after the probable cause hearing. Wis. Stat. § 51.20(7)(c).

The parties may waive the 14-day period for holding a final hearing if they enter a "hold open" agreement under Wis. Stat. § 51.20(8)(bg).

c. Circuit Court Finds Probable Cause for Guardianship and Protective Placement [§ 2.34]

If the court determines that there is no probable cause for an involuntary mental commitment but there is probable cause for a guardianship and protective placement or services, it may appoint a temporary guardian for the individual and order temporary protective placement or services under chapter 55. Wis. Stat. § 51.20(7)(d).

➤ ***Note.*** The circuit court may also appoint a temporary guardian for the individual and order temporary protective placement or services after a final commitment hearing. *See* Wis. Stat. § 51.67. However, these provisions are not the same. For example, the Wis. Stat. § 51.20(7)(d) standard for ordering involuntary medication is more stringent than the Wis. Stat. § 51.67 standard. Additionally, under Wis. Stat. § 51.67 the person may remain in a treatment facility during the 30-day temporary order if no other appropriate facility is available.

d. Circuit Court Finds Probable Cause for Treatment for Alcoholism or Drug Dependence [§ 2.35]

If the court determines that there is no probable cause for an involuntary mental commitment but there is probable cause that the individual is a fit subject for treatment for alcoholism or drug dependence, it must proceed as if a petition were filed under Wis. Stat. § 51.45(13).

e. Court Finds No Probable Cause [§ 2.36]

If the court determines there is no probable cause to believe the allegations under Wis. Stat. § 51.20(1) or to proceed under Wis. Stat. § 51.20(7)(d), the court must dismiss the proceeding. Wis. Stat. § 51.20(7)(e).

5. Review of Probable Cause Finding [§ 2.37]

Either a circuit court judge or a circuit court commissioner may conduct a chapter 51 probable cause hearing. Wis. Stat. § 757.69.

If a court commissioner conducts the hearing, the individual may ask the circuit court to conduct a de novo review of the probable cause finding. However, the circuit court has the discretion to deny the review hearing. *Milwaukee Cnty. v. Louise M. (In re Commitment of Louise M.)*, 205 Wis. 2d 162, 176, 555 N.W.2d 807 (1996). When deciding whether to hold the hearing, the circuit court should consider the following:

- The severity of the conditions of confinement, including the type and amount of psychotropic medication being administered to the individual;
- The amount of time that elapsed between the detention and the probable cause hearing;
- Whether the individual has requested a jury trial, which could lengthen the time of detention; and
- The extent of the testimony at the probable cause hearing.

Id. at 177.

If the circuit court chooses to conduct a de novo review hearing, it must do so "within a reasonable time" before the final hearing or jury trial. *Id.* at 178. Before rendering a decision, the circuit court should review the statement of emergency detention, petition for examination, physicians' reports, and the record of the probable cause hearing. *Id.* at 177–78 & n.7.

The circuit court's finding of probable cause is a nonfinal order. *Id.* at 171. To appeal a nonfinal order, the individual must file a petition for leave to appeal pursuant to Wis. Stat. §§ 808.01(1) and 809.50.

E. Examination of the Individual [§ 2.38]

1. Determination of Insurance [§ 2.39]

The circuit court may not order the individual to be examined, evaluated, or treated for a "nervous or mental disorder" unless the court first attempts to determine whether the individual is enrolled in a health maintenance organization, limited service health organization, or preferred provider plan. If the individual is enrolled, the court must also notify the plan or organization that the individual is in need of examination, evaluation, and treatment for a nervous or a mental disorder. Wis. Stat. § 51.20(7)(am).

2. Appointment of Examiners [§ 2.40]

If the circuit court finds probable cause to believe the allegations made under Wis. Stat. § 51.20(1), it then appoints two examiners to personally examine the individual. Wis. Stat. § 51.20(9)(a)1. The examiners must be

- Two licensed physicians specializing in psychiatry;
- One licensed physician and one licensed psychologist;
- Two licensed physicians, one of whom has specialized training in psychiatry; or
- If a psychologist or psychiatrist is unavailable, two licensed physicians.

Id.

The examiners must have "specialized knowledge determined by the court to be appropriate to the needs of the subject individual." *Id.* The examiners may not be related to the individual by blood, adoption, or marriage. Examiners may not hold an interest in the individual's property. *Id.*

➤ ***Practice Tip.*** Consider whether the court-appointed examiners have the "specialized knowledge" necessary to give an opinion about the individual's particular mental illness, developmental disability, or drug problem. If not, consider challenging the examiner's testimony under Wis. Stat. § 907.02(1) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3. Nomination of Court-Appointed Examiner [§ 2.41]

The individual may nominate one of the two court-appointed examiners. Wis. § 51.20(9)(a)2. However, the individual must make his or her selection known to the court within 24 hours after completion of the probable cause hearing. The nominated examiner must be available and meet the requirements of Wis. Stat. § 51.20(9)(a)1.

4. Request for Independent Examiner [§ 2.42]

The individual has a right to an independent medical or psychological examination at his or her own expense, if requested by the individual, by the individual's attorney, or any other interested party with the circuit court's permission. If the individual is indigent, the court must approve the request at the reasonable expense of the individual's county of legal residence. The independent examiner's personal testimony may be offered as evidence at the final hearing. Wis. Stat. § 51.20(9)(a)3.

5. Examination Requirements [§ 2.43]

a. Notice of the Examination [§ 2.44]

If the individual is not detained for the final hearing, the circuit court "shall designate the time and the place where the examination is to be held and shall require the individual's appearance." Wis. Stat. § 51.20(9)(a)5.

➤ ***Practice Tip.*** Circuit courts sometimes omit the time and place of examination from their orders. If this occurs, attorneys should bring it to the court's attention to have it remedied.

b. Notice of Rights [§ 2.45]

Pursuant to Wis. Stat. § 51.20(9)(a)4., before beginning an examination, the examiner must inform the individual of the following:

- The individual has a right to remain silent.
- The individual's statement may be used as a basis for commitment.
- The examiner must make a report to the court even if the individual remains silent.

The issuance of this warning before an examination establishes a presumption that the individual understands that he or she need not speak to the examiner. *Id.*

c. Examiner's Duties [§ 2.46]

The examiner must receive access to the individual's treatment records and "personally observe and examine" the individual at any suitable place. Wis. Stat. § 51.20(9)(a)5.

➤ *Practice Tip.* Sometimes the individual is examined remotely via videoconference. This might not satisfy the "personally observe and examine" requirement. Counsel should explore possible limitations of a video examination. For example, a video examination does not permit a physical examination, which might reveal causes of a mental health problem or health conditions that may affect the choice of medication. Also, the camera view may prevent the examiner from observing side effects from medication. Such limitations could affect the admissibility or weight of the examiner's evaluation.

Pursuant to Wis. Stat. § 51.20(9)(a)5. and (b), examiners' reports must meet the following requirements:

- Reports must be in writing and filed with the court.
- Reports must be independent of each other.
- Reports must state whether the individual is (1) mentally ill, developmentally disabled, or drug dependent; (2) a proper subject for treatment; and (3) dangerous.
- Reports must state the appropriateness of various treatment modalities and facilities.
- Reports and testimony, if any, shall be based on beliefs to a reasonable degree of medical certainty for physicians and of professional certainty for psychologists. If the examiners are unable to make conclusions to the required degree of certainty, they shall state that fact in their reports and testimony, if any.
- If the examiner determines that an individual is a proper subject for treatment, the examiner must recommend the appropriate level of treatment, including the level of inpatient facility that provides the least restrictive environment consistent with the individual's needs and the name of the facility where the individual should be received.
- An examiner's report may be based on hearsay, but the hearsay itself is not admissible evidence. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 156 Wis. 2d 317, 327–28, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991).
- An examiner's report may not be used as a conduit for the opinions of other professionals who have examined the individual. If the examiner relies on the opinions of other psychologists and psychiatrists, due process requires the examiner to independently confirm the facts on which those opinions are based. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, 2003 WI App 223, ¶ 16, 267 Wis. 2d 310, 671 N.W.2d 377.
- An examiner's report is inadmissible hearsay unless the examiner testifies and is available for cross-examination. *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991).

F. Dispositions of Petition for Initial Commitment [§ 2.47]

1. In General [§ 2.48]

Wis. Stat. § 51.20(13) lists possible dispositions for a commitment proceeding depending on the facts of the individual's case. Only the most common dispositions are mentioned here.

2. Dismissal of the Petition [§ 2.49]

If the county fails to prove one or more of the elements of Wis. Stat. § 51.20(1)(a), the circuit court should dismiss the petition for initial commitment. Wis. Stat. § 51.20(13)(a)1. The individual may agree to remain in the facility where he or she was detained for the hearing until alternative plans for his or her care can be made. Wis. Stat. § 51.20(13)(b).

3. Conversion to Guardianship and Protective Placement [§ 2.50]

If the court finds that commitment under chapter 51 is not warranted but the individual is a fit subject for guardianship and protective placement, the court may appoint a temporary guardian and order protective placement or services for a period not to exceed 30 days as provided in Wis. Stat. §§ 51.20(13)(a)2. and 51.67.

> ➤ ***Note.*** Wis. Stat. § 51.67 contains its own standard for involuntary medication or treatment, and the standard is different than the standards in Wis. Stat. §§ 51.20(7)(d) and 51.61(1)(g)3.

4. Commitment of the Individual [§ 2.51]

If the county proves the elements of Wis. Stat. § 51.20(1)(a), the circuit court may order commitment of an individual who is not an inmate to the care and custody of the appropriate county department. If inpatient care is not required, the court may commit the individual to outpatient treatment under the care of the county department. Wis. Stat. § 51.20(13)(a)3. Regardless of the level of care required, an initial commitment may not exceed six months. Wis. Stat. § 51.20(13)(g)1.

The individual has a due-process right to a written statement of the evidence that the fact-finder relied on for the commitment. *Vitek v. Jones*, 445 U.S. 480, 495 (1980).

The court must designate the facility or service that is to receive the individual into the mental health system, subject to Wis. Stat. § 51.06(3). Wis. Stat. § 51.20(13)(c)1.

The county department under Wis. Stat. § 51.42 or 51.437 must arrange for treatment in the least restrictive manner consistent with the individual's requirements and in accordance with any court order designating the maximum-level inpatient facility that may be used for treatment, subject to Wis. Stat. § 51.06(3). Wis. Stat. § 51.20(13)(c)2. The county department has a continuing obligation to treat the individual in a way that least restricts his or her personal liberties consistent with his or her needs. Wis. Stat. § 51.20(13)(f).

The appropriate county department under Wis. Stat. § 51.42 or 51.437 must report the initial plan of treatment for the individual to the court. Wis. Stat. § 51.20(13)(c)3.

5. Conditional Transfer [§ 2.52]

If the court finds that the individual's dangerousness is likely to be controlled with appropriate medication administered on an outpatient basis, it may order the county department or the Wisconsin Department of Health Services (DHS) to release the individual on a conditional transfer, after a facility evaluates him or her and develops an appropriate treatment plan. See Wis. Stat. §§ 51.20(13)(dm) and 51.35(1) for additional rules regarding conditional transfers.

IV. Recommitments [§ 2.53]

A. In General [§ 2.54]

Before the expiration of an initial commitment, the county may petition to extend it for up to 12 months. Chapter 51 refers to this as a recommitment (or sometimes as an extension of commitment). There is no statutory limit on the number of times a court may recommit an individual.

B. Requirements for a Recommitment [§ 2.55]

At the recommitment stage, the government must prove the same three elements with the same quantum of proof as at the commitment stage. It must prove that the individual is currently (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, ¶¶ 17–18, 24, 386 Wis. 2d 672, 927 N.W.2d 509.

At the recommitment stage, the county may prove the "dangerous" element in one of two ways. The county may prove that the individual satisfies one of the five standards of dangerousness for an initial commitment in Wis. Stat. § 51.20(1)(a)2a.–e. Or the county may satisfy Wis. Stat. § 51.20(1)(am), which is known as the "alternate standard of dangerousness."

The alternate standard provides that if the individual has been the subject of a commitment order immediately before the commencement of the recommitment proceeding, the county need not prove that he or she is currently dangerous under one or more the five standards of dangerousness for an initial commitment. Wis. Stat. § 51.20(1)(am).

> ➤ ***Note.*** The Wisconsin Supreme Court has held that Wis. Stat. § 51.20(1)(am) does not violate 14th Amendment substantive due process or equal protection. *Waupaca Cnty. v. K.E.K. (In re Mental Commitment of K.E.K.)*, 2021 WI 9, 395 Wis. 2d 460, 954 N.W.2d 366.

If the county petitions to recommit an individual under Wis. Stat. § 51.20(1)(am), it must specify which of the standards of dangerousness in Wis. Stat. § 51.20(1)(a)2.a.–e. the individual would meet if treatment were withdrawn. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 40–45, 391 Wis. 2d 231, 942 N.W.2d 277. However, neither the examiner nor the court need identify specific future dangerous acts or omissions that the individual might theoretically undertake without treatment. *Winnebago Cnty. v. S.H. (In re Mental Commitment of S.H.)*, 2020 WI App 46, ¶ 13, 393 Wis. 2d 511, 947 N.W.2d 761.

Evidence that an individual has paranoid schizophrenia and a history of going off medications and engaging in dangerous behavior when not committed, coupled with a doctor's testimony that during the individual's commitment her medications were changed and her dangerous paranoid ideations returned, was sufficient to establish dangerousness for recommitment under Wis. Stat. § 51.20(1)(am) and (a)2.c. *S.H.*, 2020 WI App 46, ¶¶ 3, 15, 393 Wis. 2d 511.

Evidence that an individual believed she did not need treatment and previously became acutely psychotic while untreated was insufficient to establish dangerousness under Wis. Stat. § 51.20(1)(am). *Winnebago Cnty. v. L.F.-G. (In re Mental Commitment of L.F.-G.)*, No. 2019AP2010, 2020 WL 2549644 (Wis. Ct. App. May 20, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Evidence that, during commitment, an individual complied with treatment and refrained from dangerous behavior but was heard saying he wanted to "snap people's necks" was insufficient to establish dangerousness under Wis. Stat. § 51.20(1)(am) and (a)2.b. *Portage Cnty. v. E.R.R. (In re Mental Commitment of E.R.R.)*, No. 2020AP870-FT, 2020 WL 5823837 (Wis. Ct. App. Oct. 1, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Evidence that an individual has schizophrenia, that schizophrenia carries an increased risk of suicide, and that if treatment were withdrawn, the individual will experience more hallucinations, have difficulty maintaining a job, and need to rely on his family for support, was insufficient to establish dangerousness under Wis. Stat. § 51.20(1)(am) and (a)2.c. or d. *D.J.W.*, 2020 WI 41, ¶¶ 53, 57, 391 Wis. 2d 231.

A county's failure to offer evidence of an individual's treatment history and uncontroverted evidence that the individual sought treatment before he was committed, would remain at his group home, and would continue treatment after the commitment's expiration precluded recommitment under Wis. Stat. § 51.20(1)(am) and (a)2.e. *Jackson Cnty. v. W.G. (In re Condition of W.G.)*, No. 2020AP961, 2020 WL 6498568 (Wis. Ct. App. Nov. 5, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

C. Commencement of a Recommitment Proceeding [§ 2.56]

The commencement of a recommitment requires multiple steps by county actors. First, 21 days before the expiration of an existing commitment, the county to which the individual is committed must (1) file an evaluation of the individual and a recommendation regarding his or her recommitment with the circuit court, and (2) provide a copy to both the individual's counsel and corporation counsel. If the filing date falls on a Saturday, Sunday, or legal holiday, the DHS or the county department must file these documents on the date that most closely precedes the Saturday, Sunday, or legal holiday. Wis. Stat. § 51.20(13)(g)2r.

If corporation counsel agrees with the recommendation, then he or she drafts a petition initiating a recommitment proceeding. Wis. Stat. § 51.20(4)(a).

The Wisconsin Supreme court has held that neither chapter 51 nor due process require a county to allege facts in support of a petition for recommitment. *Waukesha Cnty. v. S.L.L. (In re Mental Commitment of S.L.L.)*, 2019 WI 66, ¶¶ 24, 25, 387 Wis. 2d 333, 929 N.W.2d 140.

➤ ***Caution.*** This holding conflicts with the plain language of Wis. Stat. § 51.20(1)(a), (am), and (c), which require a clear and concise statement of facts showing probable cause for a commitment, and Wis. Stat. § 51.20(2)(a), which requires the circuit court to review the petition for probable cause that the individual is eligible for commitment under Wis. Stat. § 51.20(1)(am), the alternate standard of dangerousness for a recommitment. In *S.L.L.*, the court did not consider the connection between Wis. Stat. § 51.20(1)(c) and (2)(a).

The county need not serve the individual with a petition for recommitment. The county may serve the individual's lawyer instead. *S.L.L.*, 2019 WI 66, ¶ 27, 387 Wis. 2d 333 (citing Wis. Stat. § 801.14(2)).

Because a recommitment is a continuation of an initial commitment proceeding, the county need not reestablish personal jurisdiction through compliance with Wis. Stat. § 51.20(2)(b). *S.L.L.*, 2019 WI 66, ¶¶ 27–28, 387 Wis. 2d 333.

An individual who is the subject of a petition for recommitment does not have the right to request substitution if the judge is the same as the judge who presided over the original commitment or a subsequent recommitment. *State ex rel. Serocki v. Circuit Ct. for Clark Cnty.*, 163 Wis. 2d 152, 471 N.W.2d 49 (1991).

D. Examinations [§ 2.57]

At the recommitment stage, counties and circuit courts typically follow the procedures for examinations of the individual set forth in Wis. Stat. § 51.20(9), which requires that examiners to be licensed physicians or psychologists. However, the court of appeals has held that Wis. Stat. § 51.20(9) does not apply at the recommitment stage. Therefore, a nurse practitioner may examine the individual and provide an opinion on whether the individual meets the criteria for a recommitment. *Dodge Cnty. v. L.A.S. (In re Mental Commitment of L.A.S.)*, No. 2017AP302, 2017 WL 3535391 (Wis. Ct. App. Aug. 17, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

> ➤ ***Caution.*** *L.A.S.* conflicts with *Addington v. Texas*, 441 U.S. 418, 429 (1979), in which the U.S. Supreme Court held that confinement for mental illness and dangerousness requires expert psychiatrists and psychologists to interpret the facts.

E. Procedures [§ 2.58]

Like initial commitments, recommitments are governed by Wis. Stat. § 51.20(10) (hearings), (11) (jury trials), (12) (open hearings exception), and (13) (dispositions). Wis. Stat. § 51.20(13)(g)3.

At a recommitment proceeding, the fact-finder must presume that the individual is not mentally ill, a proper subject for treatment, or dangerous under Wis. Stat. § 51.20(1)(a) and (am). The county bears the burden of proving these elements with clearing and convincing evidence. Wis. Stat. § 51.20(13)(e), (g)3.; *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, ¶ 18, 386 Wis. 2d 672, 927 N.W.2d 509.

An order recommitting an individual does not automatically extend an existing order for involuntary medication or treatment. The county must again prove, with clear and convincing evidence, that the individual is incompetent to make medication or treatment decisions and is dangerous as defined by Wis. Stat. §§ 51.61(1)(g)1. and 3. and 51.20(13)(e). *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 83, 349 Wis. 2d 148, 833 N.W.2d 607.

F. Dispositions [§ 2.59]

Wis. Stat. § 51.20(13), which governs dispositions, applies to both initial commitments and recommitments. *See* Wis. Stat. § 51.20(13)(g)3. However, once a circuit court orders an initial 6-month commitment, additional consecutive recommitment orders cannot exceed 12 months. Wis. Stat. § 51.20(13)(g)1.

If the circuit court recommits the individual, it must make specific factual findings with reference to the standard of dangerousness in Wis. Stat. § 51.20(1)(a)2. on which it is relying. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 3, 40, 391 Wis. 2d 231, 942 N.W.2d 277. Also, the individual has a due-process right to a written statement by the fact-finder specifying the evidence relied on for the commitment. *Vitek v. Jones*, 445 U.S. 480, 495 (1980).

V. Right to Counsel [§ 2.60]

After the county files a petition for initial commitment or recommitment, the circuit court must ensure that the individual is represented by adversary counsel. The circuit court refers the individual to the State Public Defender, which must appoint legal counsel without first determining the individual's indigency. Wis. Stat. §§ 51.20(3), 51.60.

An individual may decline counsel appointed by the State Public Defender and instead retain private counsel at his or her own expense. Wis. Stat. § 51.60. The individual may also waive the right to counsel and proceed with self-representation. In this situation, the circuit court should conduct a colloquy to determine whether the individual is competent to waive the right to counsel. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 156 Wis. 2d 317, 323–24, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991); *see also Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), *overruled on other grounds by State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

In a commitment proceeding, defense counsel's role is to represent the individual's objectives zealously within the bounds of the law. *See State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 284, 249 N.W.2d 573 (1977). Defense counsel does not act as the individual's guardian.

The individual's right to counsel includes the right to the effective assistance of counsel. As with criminal cases, a claim for ineffective assistance of counsel during a commitment proceeding is governed by the standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Winnebago Cnty. v. J.M. (In re Mental Commitment of J.M.)*, 2018 WI 37, ¶ 7, 381 Wis. 2d 28, 911 N.W.2d 41.

VI. Discovery [§ 2.61]

Discovery in commitment cases is challenging. The county has time to locate witnesses and evidence before filing its petition. Thereafter, the case proceeds on an accelerated schedule with the final hearing typically occurring within a few weeks. This process allows little time for the individual's attorney to review records, gather evidence, contact potential witnesses, or retain an independent examiner.

The county must provide the individual's attorney access to all psychiatric and other reports 48 hours before the final hearing. Wis. Stat. § 51.20(10)(b). Failure to do so may deprive the circuit court of competence to adjudicate the case. This issue is now pending in the Wisconsin Supreme Court. *See Fond du Lac Cnty. v. S.N.W. (In re Commitment of S.N.W.)*, No. 2019AP2073, 2020 WL 3260732 (Wis. Ct. App. June 17, 2020) (unpublished opinion citable per Wis. Stat. § 809.23(3)(b)) (review dismissed).

➤ ***Note.*** This requirement is a codification of the individual's due-process right to an opportunity to prepare a meaningful defense. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).

Counsel for the individual is entitled to access the individual's treatment records and chapter 51 court records without the individual's consent. Wis. Stat. § 51.30(3)(b), (4)(b)11.

"Within a reasonable time prior to the final hearing, each party shall notify all other parties of the witnesses he or she intends to call at the hearing and the substance of their proposed testimony." Wis. Stat. § 51.20(10)(a). The statute does not define "a reasonable time." However, the failure to provide notice of a witness does not bar the presentation of the witness at the final hearing unless doing so will prejudice the opposing party. *Id.*

Also, at a "reasonable time" before the final hearing, the individual or the county may move for the production of all physical evidence that the other intends to introduce into evidence. Wis. Stat. § 51.20(9)(c). The order granting the motion must specify the time, place, manner, terms and conditions for the production of the evidence. If the individual brings the motion, the court may delay the final hearing "for such period as may be necessary for completion of discovery." *Id.*

When the county seeks commitment under Wis. Stat. § 51.20(1)(a)2.e. (the fifth standard of dangerousness), it must provide the court and the individual with an initial recommended written treatment plan describing the goals of treatment, the type of treatment to be provided, the expected treatment providers, and other detailed information before the final hearing. Wis. Stat. § 51.20(10)(cm). Treatment plans for veterans must meet additional special requirements. *See id.* When the county violates this requirement in bad faith, it is grounds for dismissal of the proceeding. *Id.*

VII. Hearings [§ 2.62]

A. Circuit Court Competency to Adjudicate the Case [§ 2.63]

A circuit court's competency refers to its power to exercise subject-matter jurisdiction in a case. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738. In general, noncompliance with statutory mandates may cause the circuit court to lose competency to adjudicate a case. *Id.* ¶ 21.

"In recognition of the significant liberty interest an individual has in living where and under what conditions he or she chooses, the legislature has imposed tight time limits in connection with involuntary detention proceedings." *Dane Cnty. v. Stevenson L.J. (In re Mental Commitment of Stevenson L.J.)*, 2009 WI App 84, ¶ 11, 320 Wis. 2d 194, 768 N.W.2d 223. Thus, if the circuit court violates a time limit for holding a commitment or placement hearing, it must dismiss the case for lack of competency to decide it. *Kindcare, Inc. v. Judith G. (In re Protective Placement, with Guardianship, of Judith G.)*, 2002 WI App 36, ¶ 12, 250 Wis. 2d 817, 640 N.W.2d 839.

Specifically, if the circuit court violates the prescribed time period for holding a probable cause hearing, it loses competency to adjudicate the commitment proceeding and must dismiss it. *Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, ¶ 12, 252 Wis. 2d 490, 642 N.W.2d 592.

If the circuit court fails to hold a final initial commitment hearing within the mandatory time limit in Wis. Stat. § 51.20(7)(c), it must dismiss the petition. *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 328–29, 320 N.W.2d 27 (Ct. App. 1982). The circuit court may reasonably extend the mandatory time limit if the individual's conduct and manipulation has caused the need for an extension. *County of Milwaukee v. Edward S. (In re Mental Commitment of Edward S.)*, 2001 WI App 169, ¶ 9, 247 Wis. 2d 87, 633 N.W.2d 241.

If the circuit court fails to hold a recommitment hearing before the existing commitment expires, it loses competency to adjudicate the petition and must dismiss it. *G.O.T. v. Rock Cnty. (In re Mental Condition of G.O.T.)*, 151 Wis. 2d 629, 631, 445 N.W.2d 697 (Ct. App. 1989).

➤ ***Note.*** Some commitment cases incorrectly use the terms "competency" and "jurisdiction" as synonyms. *See, e.g., Lockman*, 107 Wis. 2d at 328–29. The Wisconsin Supreme Court explained the correct meaning of these terms in *Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595.

B. Burden of Proof [§ 2.64]

The county must prove all facts necessary to support a commitment or a recommitment by clear and convincing evidence. Wis. Stat. § 51.20(13)(e), (g)3.; *Addington v. Texas*, 441 U.S. 418, 431–32 (1979).

C. The Individual's Procedural Rights [§ 2.65]

All chapter 51 hearings must conform to the essentials of due process of law and fair treatment. Accordingly, Wis. Stat. § 51.20(5) provides that at a chapter 51 hearing, the individual has the following rights:

- The individual has the right to counsel.
- The individual has the right to appear at the hearing in person and to present and cross-examine witnesses. *See also* Wis. Stat. § 885.60(1), (2)(a) (statutory right to be physically present).
- The individual has a right to remain silent.
- The individual has the right to an open hearing and the right to request a closed hearing. The hearing will be open unless the individual, or counsel with the individual's approval, requests a closed hearing. Wis. Stat. § 51.20(12). The circuit court must hold a public hearing on the issue of closure. *State ex rel. Wis. State J. v. Circuit Ct. for Dane Cnty.*, 131 Wis. 2d 515, 389 N.W.2d 73 (Ct. App. 1986).
- The individual has the right to a jury trial if requested under Wis. Stat. § 51.20(11).

➤ ***Note.*** In *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980), the U.S. Supreme Court established that the individual, even if he or she is a prisoner, has minimum 14th Amendment due-process rights at a commitment hearing. Although chapter 51 does not list all of these rights, *Vitek* is binding on Wisconsin courts. Under *Vitek*,

- The individual has a right to effective and timely notice of his or her due-process rights.
- The individual has the right to written notice of the commitment proceeding.
- The individual has the right to a hearing, sufficiently after the notice, to permit the individual to prepare a defense.
- The individual has the right to know the county's evidence, to be heard in person, to present documentary evidence, to present testimony, and to confront and cross-examine the county's witnesses.
- The individual has the right to an independent decision-maker.
- The individual has a right to a written statement by the fact-finder of the evidence relied on for the commitment.

D. Location of Hearing and Remote Testimony [§ 2.66]

The circuit court may hold a hearing at the facility where the individual is detained, unless the individual or defense counsel objects. Wis. Stat. § 51.20(10)(b).

If the individual is detained at a facility more than 100 miles from the courthouse, and if the facility has videoconferencing capabilities that meet the technical and operational standards of Wis. Stat. § 885.54, the circuit court may conduct a hearing by videoconferencing, unless both the individual and the county object. Wis. Stat. § 51.20(5)(c). When determining whether or how to permit the use of videoconferencing technology, the circuit court considers the criteria listed in Wis. Stat. § 885.56.

➤ ***Note.*** Wis. Stat. § 885.60(2)(d) provides that if the respondent in a chapter 51 proceeding objects to testimony via videoconferencing for a hearing where he or she is entitled to be physically present in the courtroom, "the court shall sustain the objection."

Witnesses may testify by telephone. Wis. Stat. § 807.13(2). Allowing examiners to testify by telephone does not violate the individual's right to confront witnesses. *W.J.C. v. County of Vilas (In re W.J.C.)*, 124 Wis. 2d 238, 242, 369 N.W.2d 162 (Ct. App. 1985).

➤ ***Caution.*** *W.J.C.* holds that because a commitment proceeding is civil rather than criminal, the individual has no federal or state constitutional right to confront witnesses. *Id.* at 240. This holding conflicts with *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980) (noting that an individual undergoing commitment has a 14th Amendment right to confront and cross-examine witnesses).

E. Jury Trials [§ 2.67]

An individual has a statutory right to a jury trial for a final commitment or recommitment hearing as provided in Wis. Stat. § 51.20(11)(a). *See G.O.T. v. Rock Cnty. (In re Mental Condition of G.O.T.)*, 151 Wis. 2d 629, 634–35, 445 N.W.2d 697 (Ct. App. 1989) (holding that right to a jury also applies to recommitment hearings). Defense counsel may also demand a jury trial, if the individual does not object. Wis. Stat. § 51.20(11)(a).

If the individual or defense counsel has been provided notice of the final hearing, the jury trial demand must be made "at least 48 hours in advance of the time set for final hearing." *Id.* If the time set for the final hearing has been postponed, the individual has no right to demand a jury trial 48 hours before the rescheduled hearing. *Marathon Cnty. v. R.J.O. (In re Mental Commitment of R.J.O.)*, 2020 WI App 20, ¶ 41, 392 Wis. 2d 157, 943 N.W.2d 898.

➤ ***Caution.*** The Wisconsin Supreme Court has granted review on the question of whether an adjournment of a final commitment hearing for good cause resets the 48-hour deadline for demanding a jury trial. *Waukesha Cnty v. E.J.W. (In re Mental Commitment of E.J.W.)*, No. 2020AP370, 2020 WL 6479204 (Wis. Ct. App. Nov. 4, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (review granted).

If the individual or defense counsel demands a jury trial within 5 days after detention, the jury trial shall be held within 14 days after detention. If the individual or defense counsel files a jury-trial demand after the 5th day, the final hearing shall be held within 14 days after the jury-trial demand. Wis. Stat. § 51.20(11)(a). A court may extend a commitment to accommodate a jury-trial demand as long as the final hearing is held within 14 days after the demand. *G.O.T.*, 151 Wis. 2d at 634.

Once the individual or defense counsel requests a jury trial, counsel may not withdraw the request without first consulting the individual. *S.B. v. Racine Cnty. (In re S.B.)*, 138 Wis. 2d 409, 413–14, 406 N.W.2d 408 (1987).

If there has been a proper jury demand, the court must direct a jury of six people to determine whether the individual should be committed or recommitted. Wis. Stat. § 51.20(11)(a). Five members of the jury must agree to the verdict.

➤ ***Note.*** The legislature's decision to provide for a non-unanimous 6-person jury under chapter 51, rather than a 12-person jury as in chapter 980, does not violate equal protection of the laws. *Milwaukee Cnty. v. Mary F.-R. (In re Mental Commitment of Mary F.-R.)*, 2013 WI 92, ¶ 40, 351 Wis. 2d 273, 839 N.W.2d 581.

F. Evidence [§ 2.68]

1. In General [§ 2.69]

Unless otherwise provided, the rules of evidence apply to any judicial proceeding or hearing under chapter 51. Wis. Stat. § 51.20(10)(c).

2. The Individual's Statement to the Examiner [§ 2.70]

An examiner must inform the individual of his or her right to remain silent before examination. The issuance of this warning establishes a presumption that the individual understands that he or she need not speak to an examiner. Wis. Stat. § 51.20(9)(a)4.

If, after receiving this warning, the individual makes a statement, it is admissible against him or her at a hearing. Wis. Stat. § 908.01(4)(b).

If the individual declines to make a statement, the examiner may engage in an independent review of available records and information provided by others in forming his or her opinion. However, the records and the information that the examiner relies on are subject to the rule against hearsay, *see infra* § 2.72.

3. The Individual's Medical Records [§ 2.71]

Although medical records are generally subject to the physician-patient privilege, there is no privilege as to communications and information relevant to an issue at a probable cause hearing or a final commitment hearing under chapter 51. Wis. Stat. § 905.04(2), (4)(a).

4. Hearsay [§ 2.72]

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Wis. Stat. § 908.01(3). Because the rules of evidence apply to chapter 51 proceedings, so does the hearsay rule. Wis. Stat. §§ 51.20(10)(c), 908.02, 908.03. The hearsay rule protects the individual's statutory and due-process right to confront and cross-examine witnesses. Wis. Stat. § 51.20(5); *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

An examiner's report is hearsay and cannot be admitted into evidence without testimony by the examiner and cross-examination by the defense. *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, 162 Wis. 2d 197, 205, 209–10, 470 N.W.2d 260 (1991).

Although an examiner may rely on hearsay evidence of dangerousness to form his or her opinion, the hearsay itself is inadmissible. The proponent of it must establish its truth with admissible evidence; otherwise the fact-finder cannot rely on it. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 156 Wis. 2d 317, 327–28, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991).

An examiner may not be a conduit for the hearsay opinion of another expert. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, 2003 WI App 223, ¶ 9, 267 Wis. 2d 310, 671 N.W.2d 377.

Hospital records are admissible. Wis. Stat. § 908.03(6m). However, entries within the records may be inadmissible hearsay.

G. Rules of Civil Procedure [§ 2.73]

Except as otherwise provided in chapter 51, Wis. Stat. § 801.01(2), which incorporates the rules of civil procedure, applies to any judicial proceeding or hearing held under chapter 51.

H. Defects in Proceedings [§ 2.74]

Wis. Stat. § 51.20(10)(c) provides that the court "shall" at every stage ignore defects in pleadings and proceedings that do not affect the substantial rights of either party. The individual's right to due process is a substantial right that merits consideration whenever this provision is invoked.

VIII. Treatment and Medication [§ 2.75]

A. In General [§ 2.76]

Chapter 51 includes a section on "patient's rights." A *patient* is defined as any individual who is receiving services for mental illness, developmental disabilities, alcoholism, or drug dependency. Wis. Stat. § 51.61(1).

Upon commitment or admission to a treatment facility, the individual must be informed orally and in writing of his or her rights. Wis. Stat. § 51.61(1)(a). These rights include the right to receive treatment and medication and the right to refuse treatment and medication. Wis. Stat. § 51.61(1)(f), (g)1. Copies of these rights must also be posted in each patient area and be made available to patients' guardians and immediate family members. Wis. Stat. § 51.61(1)(a).

B. Right to Treatment and Medication [§ 2.77]

An individual has the right to receive prompt and adequate treatment and rehabilitation and education services appropriate for his or her condition. Wis. Stat. § 51.61(1)(f). These rights are, however, limited to what the county is "reasonably able to provide" within available funding. *Id.*

An individual also has the right to be informed of treatment and care and to participate in his or her treatment plan. Wis. Stat. § 51.61(1)(fm); Wis. Admin. Code § DHS 94.03.

C. Right to Refuse Treatment and Medication [§ 2.78]

1. Right to Refuse [§ 2.79]

"The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). So does mandatory behavior modification as a form of treatment for mental illness. *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

An individual has the right to refuse unwanted medication or treatment under common law, the 14th Amendment (U.S. Const. amend. XIV), and Wis. Const. art. I, § I. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 42, 349 Wis. 2d 148, 833 N.W.2d 607; *see also*

Washington v. Harper, 494 U.S. 210, 221–22 (1990); *Lenz v. L.E. Phillips Career Dev. Ctr. (In re Guardianship of L.W.)*, 167 Wis. 2d 53, 73–74, 482 N.W.2d 60 (1992).

An individual does not lose the right to refuse simply because he or she is mentally ill. Wis. Stat. § 51.59(1); *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 728, 416 N.W.2d 883 (1987) (stating that "[a]n individual may be psychotic, yet nevertheless capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision").

Nor does the individual lose the right to refuse medication or treatment simply because he or she is incompetent to make medication or treatment decisions. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 31–33, 391 Wis. 2d 35, 940 N.W.2d 875.

2. No Right to Refuse [§ 2.80]

An individual may not refuse medication or treatment in the following circumstances:

- Treatment or medication is necessary to prevent serious physical harm to the individual or others. Wis. Stat. § 51.61(1)(g)1.
- An individual has been committed under the fifth standard (discussed in section 2.15, *supra*). Wis. Stat. § 51.20(1)(a)2.e.
- After a hearing to determine probable cause for a commitment but before a final hearing, a court finds probable cause that (1) an individual is not competent to refuse, (2) medication or treatment will have therapeutic value, and (3) medication or treatment will not unreasonably impair the subject's ability to participate in a later legal proceeding. Wis. Stat. § 51.61(1)(g)2.
- After a final commitment order, a court finds that (1) an individual is not competent to refuse, or (2) a situation exists in which medication or treatment is necessary to prevent serious physical harm to the individual or others. Wis. Stat. § 51.61(1)(g)3.

➤ ***Caution.*** The Wisconsin Supreme Court recently stressed that an individual may refuse medication or treatment even if he or she is incompetent to make medication or treatment decisions. For involuntary medication or treatment, the individual must be dangerous. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 31–33, 391 Wis. 2d 35, 940 N.W.2d 875. This holding calls parts of Wis. Stat. § 51.61(1)(g)2. and 3. into doubt.

3. Not Competent to Refuse [§ 2.81]

An individual is presumed competent to decide whether to refuse medication and treatment. *Virgil D. v. Rock Cnty. (In re Mental Condition of Virgil D.)*, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994). The individual's decision to refuse medication or treatment does not prove that he or she is incompetent to make an informed decision on the matter. *Id.* at 15–16.

The county must prove that an individual is incompetent to refuse medication or treatment by clear and convincing evidence. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 37, 349 Wis. 2d 148, 833 N.W.2d 607.

To meet this standard, a county must show that the individual received a timely and reasonable explanation of proposed medication, including "why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication." *Id.* ¶ 67.

> ➤ *Note.* A failure to provide the statutorily required explanation of medications is grounds for reversal of an involuntary medication order. *See Waukesha Cnty. v. Kathleen H. (In re Mental Commitment of Kathleen H.)*, No. 2014AP90, 2014 WL 2871274 (Wis. Ct. App. June 25, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

The county must also show that after receiving an explanation of the advantages and disadvantages of, and alternatives to, accepting psychotropic medication, the individual is either

- Incapable of expressing an understanding of the advantages and disadvantages of accepting medication and treatment and the alternatives, or
- Incapable of applying an understanding of the advantages and disadvantages of and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse psychotropic medication.

Wis. Stat. § 51.61(1)(g)1.–2. For a detailed discussion of the second requirement, see *Melanie L.*, 2013 WI 67, ¶¶ 67–78, 349 Wis. 2d 148.

When determining whether an individual understands the advantages, disadvantages, and alternatives to a particular medication, a circuit court should take into account the following factors:

- Whether the individual is able to identify the type of recommended medication or treatment;
- Whether the individual has previously received the type of medication or treatment at issue;
  - If so, then whether the individual can describe what happened as a result and how the effects were beneficial or harmful.
  - If not, then whether the individual can identify the risks and benefits associated with the recommended medication or treatment; and
- Whether the patient holds any patently false beliefs about the recommended medication or treatment that would prevent an understanding of legitimate risks and benefits.

Id. ¶ 50. An individual's history of noncompliance in taking medication is relevant, but it is not determinative if the individual can reasonably explain the reason for the noncompliance. *Id.* ¶ 75.

IX. Commitment and Treatment of Inmates [§ 2.82]

A. In General [§ 2.83]

The requirements and rights in Wis. Stat. §§ 51.20 and 51.61 also apply to the commitment of inmates. However, additional provisions apply exclusively to inmates. This section highlights the inmate provisions.

B. Initiation of Commitment [§ 2.84]

A conviction permits the state to confine an individual, but it does not entitle the state to declare that the individual is mentally ill and subject him or her to involuntary care in a mental hospital. *Vitek v.*

Jones, 445 U.S. 480, 493 (1980). Even inmates have a "powerful" liberty interest in "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment…." *Id.* at 495.

There are two ways a county may seek the commitment of an inmate. It may proceed under Wis. Stat. § 51.20(1), which requires it to find the inmate dangerous under Wis. Stat. § 51.20(1)(a)2.a.–e. Or it may proceed under Wis. Stat. § 51.20(1)(ar), which does not require a finding of dangerousness. *Winnebago Cnty. v. Christopher S. (In re Mental Commitment of Christopher S.)*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109.

To commit an inmate under Wis. Stat. § 51.20(1)(ar), the county's petition may allege that the inmate

- Is mentally ill,
- Is a proper subject for treatment, and
- Is in need of treatment.

However, Wis. Stat. § 51.20(1)(ar) further provides that the county's petition must

- Allege that appropriate less restrictive forms of treatment were attempted with the inmate and were unsuccessful;
- Describe the less restrictive forms of treatment that were attempted;
- Allege that the inmate has been fully informed about his or her treatment needs, the mental health services available to him or her, and his or her rights under chapter 51 and that the inmate has had an opportunity to discuss all of these matters with a licensed physician or a licensed psychologist (*see also* Wis. Stat. § 51.20(19)); and
- Allege the inmate's sentence and his or her expected date of release.

In addition, the county must attach to the petition "a signed statement by a licensed physician or a licensed psychologist of a state prison and a signed statement by a licensed physician or a licensed psychologist of a state treatment facility" attesting to either of the following:

- The inmate needs inpatient treatment at a state treatment facility because appropriate treatment is not available in the prison, or
- The inmate's treatment needs can be met on an outpatient basis in the prison.

Wis. Stat. § 51.20(1)(ar).

C. Probable Cause Hearings [§ 2.85]

For an inmate of a state prison, county jail, or house of correction, the court must hold a hearing "within a reasonable time" after the filing of the petition to determine whether there is probable cause for its allegations. Wis. Stat. § 51.20(7)(b).

D. Jury Demands [§ 2.86]

If an inmate of a state prison, county jail, or house of correction demands a jury trial within 5 days after the probable cause hearing, the final hearing shall be held within 28 days after the probable cause hearing. Wis. Stat. § 51.20(11)(a). If the inmate demands a jury trial later than 5 days after the probable cause hearing, the final hearing shall be held within 28 days after the date of demand. *Id.*

E. Dispositions [§ 2.87]

An inmate in a state prison is treated differently than an inmate in a county jail or house of correction.

If the individual is an inmate of a state prison and the county proves the elements of Wis. Stat. § 51.20(1)(a) or (ar), the circuit court will order the inmate committed to the DHS and authorize the inmate's transfer to a state treatment facility or, if inpatient care is not needed, treatment on an outpatient basis in the prison. Wis. Stat. § 51.20(13)(a)4.

If the individual is an inmate of a county jail or house of correction and the county proves the elements of Wis. Stat. § 51.20(1)(a), the court will order the inmate committed to the county department under Wis. Stat. § 51.42 or 51.437 that serves the inmate's county of residence or, if the inmate is a nonresident, order commitment to the DHS. Wis. Stat. § 51.20(13)(a)4m. The order must either authorize the inmate's transfer to a state or county treatment facility or, if inpatient care is not needed, treatment on an outpatient basis in the jail or house of corrections. *Id.*

Wis. Stat. § 51.20(13)(cm) provides additional rules for when the commitment involves the transfer of an inmate to a treatment facility.

F. Treatment and Medication [§ 2.88]

Although a finding of dangerousness is not necessary for involuntary commitment an inmate, it is necessary for involuntary medication. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 17, 34, 391 Wis. 2d 35, 940 N.W.2d 875; *see also Washington v. Harper*, 494 U.S. 210, 227 (1990).

X. Consequences of Involuntary Commitment, Treatment, and Medication [§ 2.89]

The goal of an involuntary commitment is to provide rehabilitative treatment or care to an individual so that he or she may return to society. Wis. Stat. § 51.001(1); *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, ¶ 25, 340 Wis. 2d 500, 814 N.W.2d 179.

However, a commitment deprives an individual of fundamental personal liberties. For example, a commitment denies the individual's right to choose where, with whom, and how to live. *O'Connor v. Donaldson*, 422 U.S. 563, 575–76 (1975).

A commitment might require the individual to take unwanted antipsychotic medication that can have uncomfortable and even fatal side effects. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 43 n.17, 349 Wis. 2d 148, 833 N.W.2d 607. It might also subject the individual to mandatory behavior modification as a form of treatment. *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

A commitment is stigmatizing and may cause adverse social consequences for the individual. *Addington v. Texas*, 441 U.S. 418, 425–26 (1979). Although Wis. Stat. § 51.30 aims to shield the individual's right to privacy, it authorizes the release of commitment and treatment records without the individual's consent in many situations. Also, the individual's immediate family and friends will likely know of the commitment.

An adjudication that an individual is "mentally defective" or a commitment to a mental institution automatically results in a loss of the right to possess a firearm under state and federal law. *See Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 25, 390 Wis. 2d 50, 937 N.W.2d 901; *see also* 18 U.S.C. § 921(a)(3); 18 U.S.C. § 922(g)(4); Wis. Stat. § 51.20(13)(cv).

An emergency detention or a commitment may have financial consequences for an individual, including liability for the costs of institutionalization and care under Wis. Stat. § 46.10(2) and (3). *But see Jankowski v. Milwaukee Cnty.*, 104 Wis. 2d 431, 312 N.W.2d 45 (1981) (holding that persons illegally detained or committed under chapter 51 cannot be charged with costs); *Ethelyn I.C. v. Waukesha Cnty. (In re Guardianship of Ethelyn I.C.)*, 221 Wis. 2d 109, 120–21, 584 N.W.2d 211 (Ct. App. 1998) (holding that persons illegally detained or placed under chapter 55 cannot be charged with costs).

In general, a commitment is not an adjudication that the individual is incompetent to exercise civil rights, to manage his or her affairs, to contract, to hold a professional or occupational license, to marry, to divorce, or to make a will. Wis. Stat. § 51.59(1).

On the other hand, individuals employed in certain professions are required to disclose that they have been adjudicated as "mentally defective" or committed to a mental institution. *See, e.g.*, Wis. Stat. § 343.14(2g)(a)3. (persons holding operator's license with an H endorsement for transporting hazardous materials).

Also, physicians, physician assistants, and advanced practice nurse prescribers who treat an individual with a mental condition that might affect the individual's ability to exercise reasonable and ordinary control over a vehicle must report the individual's name and condition to the Wisconsin Department of Transportation. Wis. Stat. § 146.82(3)(a). The individual's consent is not required for release of this information.

XI. Appeals [§ 2.90]

A. Procedure [§ 2.91]

The individual, his or her guardian, and the county have a statutory right to appeal a final chapter 51 order. The appellant must file the appeal within the time specified in Wis. Stat. § 808.04(3) and in accordance with Wis. Stat. § 809.30. Wis. Stat. § 51.20(15).

Wis. Stat. § 809.30(2) prescribes the procedure for filing a postdisposition motion and appeal. It explains the filing of a notice of intent to pursue postdisposition relief, the appointment of appellate counsel for the individual, the preparation and filing of transcripts and the circuit court record, and related procedures. *See also* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* ch. 19 (State Bar of Wis. 8th ed. 2020 & Supp.).

➤ ***Note.*** Appointed counsel will also find guidance on these rules in *Appellate Practice and Procedure for SPD-Appointed Counsel* (4th ed. 2020), which is available at http://wispd.org/images/AppellateFolder/templatesforms/AppellateHandbookAug2020.pdf.

As in criminal cases, it is trial counsel's obligation to file the notice of intent to pursue postdisposition relief in a chapter 51 case. Wis. Stat. § 809.30(2)(a). Final commitment hearings may conclude with two potential circuit court orders: (1) an order for commitment or recommitment, and (2) an order for involuntary medication or treatment. The notice of intent should list both orders so as not to hamper appellate counsel's consideration of potential issues for review.

The appellant must first file a motion for postdisposition relief in the circuit court, unless the grounds for seeking relief have been previously raised or are a challenge to the sufficiency of evidence to support the orders. Wis. Stat. § 809.30(2)(h); *see also Portage Cnty. v. L.E. (In re Mental Commitment of L.E.)*, No. 2019AP1841-FT, 2020 WL 97733, ¶¶ 14–15 (Wis. Ct. App. Jan. 9, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)). As in criminal cases, a claim for ineffective assistance of counsel must be litigated in the circuit court before appeal.

An appellant must initiate an appeal under Wis. Stat. § 809.10. Accordingly, the appellant must file a docketing statement when he or she files a notice of appeal. Wis. Stat. § 809.10(1)(d).

The files and records of chapter 51 proceedings are closed. Wis. Stat. § 51.30(3)(a). Therefore, appellate briefs must refer to the individual by the individual's initials or an appropriate pseudonym or designation rather than by the individual's full name. Wis. Stat. § 809.19(1)(g). In addition, appendix documents referring to the individual's name must be redacted and reproduced in the same manner. Wis. Stat. § 809.19(2)(a), (b).

Chapter 51 appeals are decided by one judge rather than a panel of three judges. Opinions written by one appellate judge are not eligible for publication. Lawyers may cite these opinions as persuasive authority, but they are not binding precedent. Wis. Stat. § 809.23(3)(b).

If a chapter 51 appeal presents an issue worthy of publication under Wis. Stat. § 809.23(1)(a), the appellant may file a motion for a three-judge panel, when he or she files a notice of appeal. Wis. Stat. § 809.41(1). If the appellant does not move for a three-judge panel, the single judge assigned to the appeal may ask the chief judge to convert the appeal to a three-judge panel. Wis. Stat. § 809.41(1). If the motion is granted, the panel may issue a published opinion establishing binding precedent.

B. Problems [§ 2.92]

1. The Mootness Doctrine [§ 2.93]

The short length of an order for commitment, recommitment, and involuntary medication or treatment creates a problem for appellate lawyers whether they represent the individual or the county. The orders often expire before the court of appeals can issue a decision addressing the merits of the appeal. Wisconsin appellate courts generally regard appeals from expired commitment orders as moot. *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 22, 390 Wis. 2d 50, 937 N.W.2d 901.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *Id.* ¶ 19 (citation omitted). An appeal from an expired commitment order may present a live controversy when the order has collateral consequences for the appellant. For example, if the commitment causes the individual to lose his or her right to possess a firearm, the appeal is not moot because reversal of the commitment order would void the firearm ban. *Id.* ¶ 25. Commitments carry many additional direct and collateral consequences for the individual. *See supra* § 2.89.

> ➤ *Note.* The issue of whether appellate courts should ever dismiss as moot appeals from expired commitment orders as moot is pending before the Wisconsin Supreme Court in *Sauk County v. S.A.M. (In re Mental Commitment of S.A.M.)*, No. 2019AP1033, 2020 WL 5240605 (Wis. Ct. App. Sept. 3, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (review granted).

In the absence of a live controversy, an appellate court may choose to decide the merits of an appeal from an expired commitment when one of the exceptions to the mootness doctrine applies. Those exceptions are the following:

- The issue is of great public importance,
- The issue involves the constitutionality of a statute,
- The issue arises often and a decision from the appellate court is essential,
- The issue is likely to recur and must be resolved to avoid uncertainty, or
- The issue is likely to recur and evade appellate review.

D.K., 2020 WI 8, ¶ 19, 390 Wis. 2d 50.

Appellate lawyers should carefully consider the mootness doctrine before filing a postdisposition motion, docketing statement, or appellate brief in a chapter 51 appeal.

➤ ***Practice Tip.*** Here are some practical suggestions for avoiding dismissal based on mootness.

- To the extent possible, frame issues for review so that they arguably fall within an exception to the mootness doctrine.
- Be aware that pursuing a postdisposition motion in the circuit court—such as a claim for ineffective assistance of counsel—will consume significant time for briefing and a hearing, increasing the odds that the underlying commitment will expire before the court of appeals can address the issue.
- Consider asking the court of appeals to place a commitment appeal on the fast-track calendar. This program is available in Districts 2, 3, and 4 of the Wisconsin Court of Appeals, but not District 1. The fast track is not suitable for appeals raising more than three issues or issues worthy of publication. For more on the fast-track calendar see Heffernan, *Appellate Practice and Procedure in Wisconsin, supra* § 2.91, ch. 15.
- Explore filing a motion to advance the case in the court of appeals pursuant to Wis. Stat. § 809.20. A motion to advance is appropriate in situations in which a delay may be "prejudicial to the accomplishment of justice." *Id.*

2. Remand Proceedings [§ 2.94]

By the time an appellate court reverses a commitment or treatment order and remands the case for further proceedings, the deadline for holding the final hearing will have lapsed. Thus, the circuit court will lack competency to adjudicate the petition. *See supra* § 2.63.

Likewise, by the time an appellate court orders remand proceedings, the county's evidence that the individual is both mentally ill and dangerous will be stale. *See Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, ¶ 16, 386 Wis. 2d 672, 927 N.W.2d 509 (holding that commitment must be based on finding of current, not retrospective, mental illness and dangerousness).

XII. Confidentiality and Release of the Individual's Records [§ 2.95]

A. In General [§ 2.96]

Chapter 51 proceedings require scrutiny of deeply personal information about an individual's mental health, emotional well-being, and behavior. The legislature, through Wis. Stat. § 51.30, protects the privacy of these matters to shield the individual from stigma and facilitate his or her reintegration into society after a commitment. *Billy Jo W. v. Metro (In re Mental Condition of Billy Jo W.)*, 182 Wis. 2d 616, 632, 514 N.W.2d 707 (1994).

B. Court Records [§ 2.97]

Wis. Stat. § 51.30(3)(a) provides that records and files from chapter 51 proceedings are closed unless a statutory exception applies.

The individual is entitled to see his or her court files and records. Wis. Stat. § 51.30(3)(a).

The individual's counsel, his or her guardian ad litem, and the county may access chapter 51 court files and records to prepare for commitment or recommitment proceedings, appeals, or other actions under chapters 51, 971, 975, and 980. They need not obtain the individual's informed consent first. Wis. Stat. § 51.30(3)(b).

A court may order the release of chapter 51 records and files with the individual's informed written consent. Wis. Stats. § 51.30(3).

The Department of Corrections, the DHS, the Department of Justice, and prosecutors may access chapter 51 court files and records without the individual's informed consent for purposes specified in Wis. Stat. § 51.30(3)(bm) and (d).

C. Registration and Treatment Records [§ 2.98]

Registration records are records created by the DHS, county departments, and treatment facilities while providing services to individuals under chapter 51. Wis. Stat. § 51.30(1)(am). Treatment records refer to "registration records" and all other records created in the course of providing services to individuals under chapter 51. These include records kept by mental health professionals who are not affiliated with a county department or a treatment facility. Wis. Stat. § 51.30(1)(b).

Wis. Stat. § 51.30(4)(a) provides the general rule that all treatment records are confidential and privileged to the subject individual unless a statutory exception applies or unless the individual gives informed written consent. It then lists dozens of exceptions for situations when these records may be released without the individual's consent.

The individual's counsel, his or her guardian ad litem, and the county may access registration and treatment records, without modification, to prepare for commitment or recommitment proceedings, appeals, or other actions under chapters 51, 971, 975, and 980. They need not obtain the individual's informed consent first. Wis. Stat. § 51.30(4)(b)11.

Registration and treatment records may be released pursuant to a lawful order of a court of record. Wis. Stat. § 51.30(4)(b)4.

Additional statutes address the confidentiality and release of an individual's treatment records, but they are beyond the scope of this chapter. *See, e.g.*, Wis. Stat. §§ 118.125(4), 610.70(3), 905.03, 905.04.

Wisconsin's patients' rights statute provides that an individual receiving services under chapter 51 has the right to confidentiality of all treatment records. Wis. Stat. § 51.61(1)(n). The individual may challenge a violation of this right by filing a grievance under Wis. Stat. § 51.30(8) or an action for compensatory and exemplary damages under Wis. Stat. § 51.30(9). The disclosure of confidential information may result in fines, penalties, discipline, or even imprisonment. Wis. Stat. § 51.30(8), (9), (10), (11).

XIII. Conclusion [§ 2.99]

This is a summary of chapter 51's provisions pertaining to involuntary civil commitments, treatment, and medication as well as current federal and state case law governing these proceedings. It is designed to help judges and lawyers working on these issues balance the individuals' needs for health and safety with their fundamental rights, in order to promote fair and reliable outcomes. Wisconsin case law on these matters is rapidly evolving. At the time of publication, several appeals testing commonly used provisions of chapter 51 are pending in Wisconsin's appellate courts. It is therefore especially important to check the current state of the law when working in this field.

3

Chapter 980 Commitments

Andrew Hinkel
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